Supreme Court, U. S.
FILED
FEB 14 1979
...AK, JR., CLERK

No. 78-970

In the Supreme Court of the United States

OCTOBER TERM, 1978

CLYDE ROWLETT AND DICK VERMILLION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-970

CLYDE ROWLETT AND DICK VERMILLION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied a fair trial because the government did not disclose an exculpatory tape recording prior to trial and that the introduction against each petitioner of a co-conspirator's declarations in furtherance of the conspiracy violated the Confrontation Clause of the Sixth Amendment.

1. After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on four counts of obstructing commerce by extortion, in violation of 18 U.S.C. 1951, and conspiracy to commit that offense, in violation of the same statute. The district court preliminarily sentenced each petitioner, under 18 U.S.C. 4205(c) and (d), to consecutive terms of 20 years' imprisonment on each count. The court of appeals affirmed (Pet. App. 13-15).

The evidence at trial showed that petitioner Vermillion, as Sheriff of Whitley County, Kentucky, and his deputy, petitioner Rowlett, accepted payments from Kirby Collett, a government informant, in exchange for forbearing any official action with regard to Collett's bootlegging operation (Tr. 1319-1320, 1334, 1367, 1370, 1380-1381, 1411, 1417, 1421-1424, 1448-1450, 1465-1469). The evidence consisted primarily of tape-recorded conversations between Collett and each petitioner, as well as Collett's independent testimony about petitioners' conduct (see, *e.g.*, Tr. 1330-1342).

2. Before trial, defense counsel requested and the district court ordered that the government disclose all tape recordings of petitioners' conversations with Collett. The government complied with that order (H. Tr. 33-34).[1] During trial, however, the government discovered a tape of a conversation between Collett and petitioner Vermillion that had not been disclosed to the defense earlier (Tr. 811-813). The government promptly informed the court and played the tape for defense counsel (Tr. 819). The tape was exculpatory (see Pet. App. 14) because it showed that petitioner Vermillion had threatened to raid any bootlegging operation being conducted by Collett. Collett indicated to petitioner Vermillion that he thought Vermillion was "supposed to be getting paid," and Vermillion said he did not know what Collett was talking about (Tr. 825-826). Upon receipt of this tape, defense counsel moved for a continuance, but the district court denied the motion when defense counsel failed to explain how the new tape would alter the defense they had planned to present (Tr. 824-835). The court observed that the motion was made late on a Friday morning and that only a few hours of trial time remained before the weekend recess (Tr. 835).

---

[1]"H. Tr." refers to the transcript of the September 6, 1977, hearing on petitioners' pretrial motions.

Petitioners were not deprived of a fair trial by these proceedings. The additional tape was disclosed to the defense early in the government's presentation of proof, before its principal witness Collett had testified. The court of appeals held (Pet. App. 15) that "the failure [to disclose the exculpatory tape] was discovered in time for full and adequate correction." At no time have petitioners alleged that the government's delay in disclosing the tape was deliberate. Likewise, petitioners have not identified any way in which they were prejudiced by the government's failure to produce the tape until after the trial had begun. *United States* v. *Agurs*, 427 U.S. 97 (1976), on which petitioners rely (Pet. 8), does not support their position. There the prosecution failed to disclose exculpatory evidence to the defense at any time during trial, whereas here the tape recording was disclosed prior to the close of the government's case. *Agurs* does not require reversal when exculpatory material is provided to the defense at trial "in time for full and adequate correction" of any earlier omission. *United States* v. *Enright*, 579 F. 2d 980, 989 (6th Cir. 1978).[2]

3. Petitioners also contend (Pet. 10-12) that the admission of the tape recordings of their individual conversations with Collett violated the Confrontation Clause of the Sixth Amendment. Petitioners argue that these recordings were "crucial" and "devastating" hearsay evidence with respect to the party not involved in each conversation and that, because petitioners chose not to testify at trial, neither petitioner was able to cross-examine the other concerning statements on the tape recordings in which one petitioner implicated the other.

---

[2]As the Court noted in *Agurs*, *supra*, "[t]he rule of *Brady* v. *Maryland*, 373 U.S. 83, * * * involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense" (427 U.S. at 103; emphasis added).

There is no dispute that all of petitioners' statements were admissible as declarations of a co-conspirator in furtherance of the conspiracy.[3] Petitioners rely on *Dutton* v. *Evans*, 400 U.S. 74 (1970), in support of the contention that the Confrontation Clause demands a higher standard of reliability than the evidentiary rule admitting co-conspirators' declarations. *Dutton*, however, involved a state hearsay exception substantially broader than the federal rule, and the Court in *Dutton* specifically stated that "we do not question the validity of the coconspirator exception applied in the federal courts." *Id.* at 80.

Since *Dutton* was decided, the courts of appeals have uniformly held that co-conspirators' declarations that have satisfied the federal evidentiary rule have satisfied the Confrontation Clause as well. Some courts have concluded that the Confrontation Clause is satisfied whenever the standards of Fed. R. Evid. 801(d)(2)(E) are met. See *United States* v. *Papia*, 560 F. 2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); *United States* v. *Addonizio*, 451 F. 2d 49, 71 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972); *United States* v. *Cox*, 449 F. 2d 679, 688-689 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972). Other courts have held that while evidence that is admissible under Fed. R. Evid. 801(d)(2)(E) is not automatically admissible under the Confrontation Clause, the standards will be treated as equivalent absent some special circumstances. See *United States* v. *Haynes*, 560 F. 2d 913, 916 (8th Cir.), cert. denied, 434 U.S. 974 (1977); *United States* v. *Puco*, 476 F. 2d 1099, 1107 (2d Cir.) (supplemental opinion), cert. denied, 414 U.S. 844 (1973). The Ninth Circuit has stated that the admissibility of co-conspirators' declarations

[3]Although petitioners refer (Pet. 2) to the "co-conspirators exception to the hearsay rule," the Federal Rules of Evidence treat co-conspirators' declarations as if they were not hearsay at all. Fed. R. Evid. 801(d)(2)(E).

must be separately tested under Rule 801(d)(2)(E) and the Confrontation Clause, but in each case in which the Ninth Circuit has faced this problem, it has found that evidence that satisfies Rule 801 also satisfies the constitutional test. See *United States* v. *King*, 552 F. 2d 833 (1976), cert. denied, 430 U.S. 966 (1977); *United States* v. *Snow*, 521 F. 2d 730 (1975), cert. denied, 423 U.S. 1090 (1976); *United States* v. *Baxter*, 492 F. 2d 150, 177 (1973), cert. denied, 416 U.S. 940 (1974); *United States* v. *Adams*, 446 F. 2d 681, cert. denied, 404 U.S. 943 (1971).

Even if special indicia of reliability are necessary, they were clearly present in this case. Petitioners' recorded conversations with Collett occurred during the course of the conspiracy. Neither petitioner had any reason to implicate the other falsely when talking to the person from whom they were together extorting money. Moreover, the guilt of each petitioner was overwhelmingly shown by independent evidence, including the testimony of Collett and each petitioner's own tape-recorded, self-incriminating statements. (As to petitioner Rowlett, see Tr. 1334, 1367, 1370, 1380-1381, 1411, 1417; as to petitioner Vermillion, see Tr. 1319-1320, 1421-1424, 1448-1450, 1465-1469.) Like *Dutton* v. *Evans*, *supra*, 400 U.S. at 87, this case "does not involve [hearsay] evidence in any sense 'crucial' or 'devastating.'" Review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

DOJ-1979-02